

Moments of flux in intermediary liability for copyright infringement

Nicolas Suzor, Rachel Choi, and Kylie Pappalardo

Abstract: This chapter provides an overview of a recent shift in regulatory strategies to address copyright infringement toward enlisting the assistance of general purpose Internet Service Providers. In Australia, the High Court held in 2012 that iiNet, a general purpose ISP, had no legal duty to police what its subscribers did with their internet connections. We provide an overview of three recent developments in Australian copyright law since that decision that demonstrate an emerging shift in the way that obligations are imposed on ISPs to govern the actions of their users without relying on secondary liability. The first is a new privately negotiated industry code that introduces a 'graduated response' system that requires ISPs to pass on warnings to subscribers who receive allegations of infringement. The second involves a recent series of Federal Court cases where rightsholders made a partially successful application to require ISPs to hand over the identifying details of subscribers whose households are alleged to have infringed copyright. The third is a new legislative scheme that will require ISPs to block access to foreign websites that 'facilitate' infringement. We argue that these shifts represent a greater sophistication in approaches to enrolling general purpose intermediaries in the regulatory project. We also suggest that these shifts represent a potentially disturbing trend towards enforcement of copyright law in a way that does not provide strong safeguards for the legitimate constitutional due process interests of users. We conclude with a call for greater attention and research to better understand how intermediaries make decisions when governing the conduct of users, how those decisions may be influenced by both state and non-state actors, and how the rights of individuals to due process can be adequately protected.

"Technology creates new intermediaries, and changes what it's possible to require of them."¹

Regulating the internet is hard to do. The scale of the internet, its transnational nature, and the anonymity of users make it extremely costly to target the individuals who breach national civil or criminal laws. The only effective and scalable way to regulate the actions of large numbers people on the internet is through online intermediaries.² These are the institutions that facilitate communication: internet service providers ('ISPs'), search engines, content hosts, and social networks. Governments, private firms, and civil society organisations are increasingly seeking to compel these intermediaries to take more responsibility to prevent or respond to infringements of intellectual

1 Cory Doctorow, *Information Doesn't Want to Be Free: Laws for the Internet Age* (McSweeney's, 2014) 70.

2 Jack L Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (Oxford University Press US, 2006).

property ('IP') rights (particularly copyright and trademark). Around the world, intermediaries are increasingly subject to a variety of obligations to help enforce IP rights, ranging from informal social and governmental pressure, to industry codes and private negotiated agreements, to formal legislative schemes.³ This chapter provides an example of this emerging shift toward increased responsibilities for intermediaries, through examination of a series of recent developments in Australian copyright law. We review recent changes to the law that propose to require general purpose ISPs to pass on warning notices and allegations of infringement to their subscribers, to hand details of subscribers who have received allegations of infringement over to rightsholders, and to attempt to block access to foreign websites that 'facilitate' infringement. These changes represent a stark policy move away from the 2012 *Roadshow Films v iiNet* decision, where the Australian High Court held that a general purpose ISP had no legal duty to concern itself with what its subscribers did with their internet connections.⁴ The full impact of these recent changes is not yet knowable. Taken together, however, they can be seen as either providing more effective and efficient mechanisms for regulating user behaviour or, less optimistically, as a worrying trend in unduly strengthening, through public law, the influence of private actors.

An emerging shift in governance: enrolling private intermediaries

As the internet continues to grow in importance for our everyday lives, the inability of existing legal instruments to provide effective remedies for civil wrongs, and constraints on illegal behaviour, is becoming a massive problem across the entire breadth of national legal systems. There is a great deal of frustration, globally, that the internet has proved so difficult to regulate, and that the intermediaries who are in a position to act often have no formal responsibility to do so.

One of the most common obligations that private actors seek to have imposed upon intermediaries is an obligation to respond to complaints and remove content from their networks. 'Notice-and-takedown' is the broad term given to this process. Such obligations are currently most formalised and most used in copyright law: Google alone receives over 32 million copyright takedown requests a month to remove URLs from its search engine.⁵ The effectiveness of this type of regime – at least in terms of the speed with which notices are processed – makes it an attractive model to private actors.

The operation of notice-and-takedown in copyright is predicated upon the threat of potential liability for non-compliance being placed upon intermediaries. The prototype for this type of law, the United States' *Digital Millennium Copyright Act* ('DMCA'), was enacted in 1998 as a legislative bargain: it provides certainty for telecommunications providers in the form of immunity from financial penalty for copyright infringement, on the condition that they adopt efficient schemes for removing apparently infringing content when notified.⁶

The core problem with liability as a motivator is that there are few intermediaries left to be sued. In copyright in

3 See further, Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147.

4 *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16 (20 April 2012).

5 Google, *Transparency Report* (2014) <<http://www.google.com/transparencyreport/?hl=en>>.

6 See Dianne M. Barker, 'Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA' (2005) 20 *Berkeley Technology Law Journal* 47, 47-50.

particular, the rules for intermediary liability have somewhat settled – particularly for US-based copyright industries suing under US law. It is now generally clear that intermediaries whose role in infringement is limited to providing a general purpose service or technology with substantial non-infringing uses,⁷ and who do not actively encourage infringement,⁸ will not be liable for infringement. Rightsholders are now, by and large, in a position where the major intermediaries who facilitate infringement in a way that would attract liability are not often within jurisdictional reach, and other intermediaries upon whom some duties might usefully be imposed are largely immune from suit.

Take, for example, current debates about filesharing over BitTorrent. The developers of the general purpose BitTorrent protocol and its software implementations are often not liable for how it is used. The people who upload infringing content are difficult to identify and many. The indexers and trackers of any significant size that facilitate access to infringing content are dispersed – The Pirate Bay, most notably, has proved extremely difficult to shut down on the basis that its human and technical infrastructure is very often out of jurisdictional reach.⁹ This leaves rightsholders with few avenues for enforcement under existing law.

The current limits of intermediary liability have led copyright lobbyists to exert massive pressure to change the rhetoric of enforcement. One of the key frontiers for copyright enforcement over the last decade has been a struggle over whose responsibility it is to enforce copyright interests. Rightsholders, particularly the large US-based entertainment and publishing industries, are currently seeking to require various groups of intermediaries, who are not otherwise liable, to 'do something' about rampant infringement. In particular, the agenda of rightsholders for the greater part of the last decade has been to seek new mechanisms to co-opt ISPs into enforcing copyright. The key specific goals have been to get ISPs to block access to infringing content hosted outside of the jurisdiction; to pass on notices of infringement to their subscribers and impose sanctions upon allegedly repeat infringers; and to hand over the personal details of subscribers who have received multiple allegations of infringement.

This chapter illustrates one aspect of the ongoing global efforts to seek to impose new obligations on intermediaries through a discussion of three recent developments in Australian copyright law. Australia is a particularly illuminating jurisdiction in this regard as it has been one of the important targets for development of new copyright enforcement measures over the last decade. These efforts have included high profile lawsuits, largely financed by the US copyright industries,¹⁰ one against the operators of the Kazaa filesharing network¹¹

7 *Sony Corp of America v Universal City Studios, Inc* (1984) 464 U.S. 417.

8 *MGM Studios, Inc v Grokster, Ltd* (2005) 545 U.S. 913.

9 See Bernard A. Mantel, 'The Google Police: How the Indictment of the Pirate Bay Presents a New Solution to Online Piracy' (2012) 20 *U. Miami Bus. L. Rev.* 77; Tara Touloumis, 'Buccaneers and Bucks from the Internet: Pirate Bay and the Entertainment Industry' (2009) 19 *Seton Hall J. Sports & Ent. L.* 253.

10 See Robert D McCallum, *Diplomatic Cable 08CANBERRA1197, FILM/TV INDUSTRY FILES COPYRIGHT CASE AGAINST AUSSIE ISP* (30 November 2008) Wikileaks <<https://wikileaks.org/cable/2008/11/08CANBERRA1197.html>> Referring to the iiNet case, the US Ambassador to Australia writes: 'Despite the lead role of AFACT and the inclusion of Australian companies Village Roadshow and the Seven Network, this is an MPAA/American studios production. ... MPAA was the mover behind AFACT's case (AFACT is essentially MPAA's Australian subcontractor; MPAA/MPA have no independent, formal presence here), acting on behalf of the six American studios involved. MPAA prefers that its leading role not be made public. AFACT and MPAA worked hard to get Village Roadshow and the Seven

and the other against a large general purpose ISP.¹² Over the same period, intense political debates have erupted over, on the one hand, the apparently high rates of copyright infringement amongst Australian consumers and, on the other hand, the relatively high prices and low levels of service to which Australian consumers are exposed in accessing copyright goods when compared with the experiences of consumers in other western countries.¹³ Pressure on the Government to reform copyright law has been strong from all sides: users of copyright are seeking a dramatic increase in exceptions to copyright infringement;¹⁴ the telecommunications industry is seeking greater certainty through the expansion of "safe harbours"¹⁵ from liability;¹⁶ and rightsholder groups are heavily engaged in lobbying for stronger copyright enforcement mechanisms. As part of these latter two lobbying efforts, large media conglomerates have drastically increased their political donations in recent years and represent some of the biggest single donors to both major political parties.¹⁷

These lobbying and litigation efforts have been effective in Australia in bringing about three major legal changes in 2015. First, a government-sanctioned new industry code implementing a graduated response scheme has been developed and is expected to be approved by late 2015.¹⁸ Second, in an Australian court, in April 2015, rightsholders were partially successful in seeking preliminary discovery from ISPs of the identifying details of account holders alleged to have infringed their rights.¹⁹ Third, in June 2015, a new provision came into force in Australian copyright law that enables rightsholders to apply for orders requiring ISPs to block access to foreign websites that facilitate copyright infringement.²⁰ These developments have all proceeded on the basis that ISPs are not generally legally liable for the infringing acts of their subscribers: they follow a highly-publicised, unsuccessful attempt by rightsholders to extend intermediary liability law to a general purpose ISP in Australia.²¹ In this case against iiNet, the plaintiffs, led by the US Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA), sought a judgment which would have had the result that

Network to agree to be the public Australian faces on the case to make it clear there are Australian equities at stake, and this isn't just Hollywood 'bullying some poor little Australian ISP.'".

11 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465.

12 *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16 (20 April 2012).

13 House Standing Committee on Infrastructure and Communications, 'At What Cost? IT Pricing and the Australia Tax' (Parliament of Australia, 29 July 2013)

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm>.

14 Australian Law Reform Commission, 'Copyright and the Digital Economy' (122, ALRC, 13 February 2014) <<http://www.alrc.gov.au/publications/copyright-report-122>>.

15 "Safe harbour" schemes limit relief against carriage service providers who fall within a "safe harbour" specified in Pt V Div 2AA of the *Copyright Act 1968* from the risk of liability for inadvertently hosting or communicating infringing material on behalf of their users.

16 Communications Alliance Ltd, 'Attorney-General's Consultation Paper on Revising the Scope of the Safe Harbour Scheme in the Copyright Act 1968' Submission (22 November 2011)

<http://www.commsalliance.com.au/__data/assets/pdf_file/0018/32337/Copyright-Safe-Harbours-submission-22-Nov-2011-Final.pdf>.

17 Allie Coyne, 'Village Roadshow Boosts Donations amidst Copyright Crackdown' *iNews*, 2 February 2015 <<http://www.itnews.com.au/News/399933,village-roadshow-boosts-donations-amidst-copyright-crackdown.aspx>>.

18 Communications Alliance, 'Copyright Notice Scheme, Industry Code C653:2015' <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf>.

19 *Dallas BuyersClub LLC v iiNet Ltd* [2015] FCA 317.

20 *Copyright Act 1968* (Cth), s. 115A.

21 *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42.

ordinary consumer ISPs could be held liable when their subscribers used their networks to infringe.

In the *iiNet* case, the Australian High Court found that Australian ISPs are under no obligation to take measures against subscribers – such as sending infringement warning notices or terminating subscriber accounts – based only on the strength of copyright infringement allegations made by rightsholders.²² The primary infringements at issue in *iiNet* involved the communication of films and television programs using the BitTorrent protocol. The High Court placed great emphasis on the fact that *iiNet*, as a mere ISP, had no control over BitTorrent or how its subscribers were using filesharing technologies.²³ The court stated: “[T]he extent of *iiNet*’s power was limited. It had no direct power to prevent the primary infringements and could only ensure that result indirectly by terminating the contractual relationship it had with its customers.”²⁴ This “indirect” contractual power was not sufficient to ground liability. There were associated issues, including with the reliability of the rightsholders’ notices of infringement, that led the court to conclude that *iiNet*’s inaction in the face of these allegations had been reasonable.²⁵ Ultimately, the High Court held that *iiNet* was not liable for its inaction in response to allegations of infringement against its users. Its indifference was simply that of “somebody who did not consider it his business to interfere, who had no desire to see another person’s copyright infringed, but whose view was that copyright and infringement were matters in this case not for him, but for the owners of the copyright.”²⁶

After *iiNet*: enlisting ISPs in the fight against copyright infringement

Given the almost complete failure to extend liability to general purpose ISPs, rightsholders have not resorted to further litigation in Australia but have instead sought to enlist the aid of ISPs through other means. The primary focus across several jurisdictions has been either to develop new statutory responsibilities for ISPs, or to achieve the same ends through non-legislative means. In France, South Korea, and New Zealand, rightsholders have been able to shepherd the introduction of ‘graduated response’ legislation designed to shift some of the burden for enforcement of copyright claims to ISPs and administrative agencies.²⁷ A similar scheme in the UK is still under development.²⁸

In a number of jurisdictions where it has not been possible to introduce legislative graduated response schemes,

22 See further: Kylie Pappalardo, ‘Duty and Control in Intermediary Copyright Liability: An Australian Perspective’ (2014) 4(1) *IP Theory* 9; David Lindsay, ‘ISP Liability for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v iiNet*’ (2012) 62(4) *Telecommunications Journal of Australia* 53.1.

23 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012) [112], [137] (Gummow and Hayne JJ).

24 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012) [69]–[70] (French CJ, Crennan and Kiefel JJ), see also [139] (Gummow and Hayne JJ).

25 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012) [78] (French CJ, Crennan and Kiefel JJ).

26 *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012) [144] (Gummow and Hayne JJ), see also [75]–[76] (French CJ, Crennan and Kiefel JJ).

27 Michael Boardman, ‘Digital Copyright Protection and Graduated Response: A Global Perspective’ (2010) 33 *Loyola of Los Angeles International and Comparative Law Review* 223; Peter K Yu, ‘The Graduated Response’ (2010) 62 *Florida Law Review* 1373. For an excellent overview and assessment of these schemes, see Rebecca Giblin, ‘Evaluating Graduated Response’ (2014) 37 *Columbia Journal of Law and the Arts* 147.

28 In July 2014, the UK government announced a new industry scheme, ‘Creative Content UK’, comprising of two components – a large-scale multi-media copyright education campaign, commencing soon, and a notice-and-notice subscriber alert program that will be implemented at a later date following the education campaign. See <https://www.gov.uk/government/news/new-education-programme-launched-to-combat-online-piracy> and <http://www.bpi.co.uk/home/uk-creative-industries-and-isps-partner-in-major-new-initiative-to-promote-legal-online-entertainment.aspx>.

rightsholders have instead sought to achieve the same practical regime (without, at least initially, any direct sanctions for users) through private agreements and industry codes of conduct.²⁹ This has been achieved largely through 'coerced self-regulation'³⁰ – with the state is still very much involved in ensuring that ISPs cooperate with rightsholders, issuing veiled and explicit threats to directly intervene if an agreement is not reached.³¹ In Ireland, rightsholders successfully sued Eircom, Ireland's largest ISP, leading to a settlement through the development of a privately negotiated graduated response scheme.³² In the United States, a comprehensive 'Copyright Alert System' (colloquially called the 'six strikes system') was implemented after years of negotiations between ISPs and the content industry.³³ Both schemes impose various obligations on ISPs to forward on allegations of infringement and, ultimately, implement some form of technical sanctions against alleged repeat infringers.³⁴

To date, there is no evidence that either the Irish scheme or the US system has reduced instances of copyright infringement.³⁵ Data is scant, and the little evidence that has been collected is unreliable because it does not account for the possibility that users have not *ceased* infringement but have merely transitioned to other less detectable forms of infringement.³⁶ Additionally, graduated response schemes can adversely impact upon internet users' rights. The most concerning impact is that these schemes shift the burden of proof from the copyright owner to the accused user.³⁷ In ordinary civil cases, the burden of proof falls upon the plaintiff to establish copyright infringement. Yet under these schemes, an allegation of infringement automatically triggers an action taken by the ISP against the accused user. If the user wishes to dispute the allegation he or she must raise evidence that his or her use was non-infringing or that the allegation is faulty in some way. This shifting of the

29 For example, *EMI Records & Ors v Eircom Ltd* [2010] IEHC 108 [9].

30 See Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24.

31 Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 *Oregon Law Review* 81.

32 Since this scheme forms part of a settlement, the precise details are private. However, researchers have pieced together what they can of the terms: see Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147, 172-174.

33 See <http://www.copyrightinformation.org/the-copyright-alert-system/> and the Memorandum of Understanding between the parties (as occasionally amended), dated 6 July 2011 at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>; Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147, 175-177. See also Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1.

34 See <http://www.copyrightinformation.org/the-copyright-alert-system/> and the Memorandum of Understanding between the parties (as occasionally amended), dated 6 July 2011 at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>; Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147, 175-177; Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1.

35 Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147, 191, 192.

36 Ibid, 191-2, 198-200. The reaction of users in seeking ways of filesharing that are increasingly difficult to detect or quash accords with regulatory theory that punitive enforcement of the law is often less effective than persuasion, at least where punishment is used as an early choice. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), 26: "punitive enforcement engenders a game of regulatory cat-and-mouse whereby [actors] defy the spirit of the law by exploiting loopholes and the state writes more and more specific rules to cover the loopholes".

37 See Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1, 53-53.

burden of proof raises significant concerns about the legitimacy of these schemes from a due process point-of-view.³⁸ In the US scheme, for instance, users are limited to only six ‘defences’ that they can raise against allegations of infringement and the defences do not cover the full spectrum of limitations and exceptions under US copyright law.³⁹ Thus, users may have punitive action taken against them for uses that are not, in fact, infringing, and there is very little that users can do about it. Privately negotiated graduated response schemes also raise particular concerns related to transparency. The private nature of these schemes tends to mean that they are shrouded in secrecy, especially as to the specific processes used for the collection and evaluation of data against users.⁴⁰

Even before the High Court’s decision in the *iiNet* case, the Australian Government had been pushing for ISPs and the copyright industry in Australia to formulate an industry code of practice for combatting online infringement. In 2010, then Minister for Broadband, Communications and the Digital Economy, Stephen Conroy, expressed a desire that the film and internet industries “sit down and try to come up with a code of conduct” for dealing with online infringement.⁴¹ In September 2011, the Federal Attorney-General’s Department convened a meeting with ‘key stakeholders’⁴² to discuss the state of the legislative landscape in relation to online copyright infringement.⁴³ Attorney-General Robert McClelland⁴⁴ “consistently stated that his preference [was] for an industry-based solution” rather than legislative reform.⁴⁵

38 See Nicolas Suzor and Brian Fitzgerald, ‘The Legitimacy of Graduated Response Schemes in Copyright Law’ (2011) 34(1) *University of New South Wales Law Journal* 1; Annemarie Bridy, ‘Graduated Response American Style: “Six Strikes” Measured Against Five Norms’ (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1, 53-53.

39 Annemarie Bridy, ‘Graduated Response American Style: “Six Strikes” Measured Against Five Norms’ (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1, 57-58; (arguing that the scheme does not permit users to raise defences based on sections 107 to 122 of the US Copyright Act, other than fair use in s. 109, and does not permit a user to argue that the relevant content was in the public domain for any reason other than that it was published before 1923); Rebecca Giblin, ‘Evaluating Graduated Response’ (2014) 37 *Columbia Journal of Law and the Arts* 147, 178-180.

40 Annemarie Bridy, ‘Graduated Response American Style: “Six Strikes” Measured Against Five Norms’ (2012) 23 *Fordham Intellectual Property Media and Entertainment Law Journal* 1, 57, 62-66; see also Nicolas Suzor and Brian Fitzgerald, ‘The Legitimacy of Graduated Response Schemes in Copyright Law’ (2011) 34(1) *University of New South Wales Law Journal* 1.

41 Ben Grubb, ‘Conroy calls for piracy code of conduct’, *ZDNET*, 7 February 2010, reporting on Stephen Conroy’s interview on ABC’s *Hungry Beast* program on 5 February 2010, <http://www.zdnet.com.au/conroy-calls-for-piracy-code-of-conduct-339300874.htm>.

42 Including representatives from the Australian Content Industry Group (ACIG), Australian Federation Against Copyright Theft (AFACT), Digital Entertainment Alliance Australia (DEAA), Telstra, Optus, the Internet Industry Association (IIA) and the Communications Alliance. It is worth noting that ‘key stakeholders’ did not include user rights groups.

43 Andrew Colley, ‘A-G in call for talks on online piracy’, *The Australian*, 24 August 2011, <http://www.theaustralian.com.au/australian-it/a-g-in-call-for-talks-on-online-piracy/story-e6frgakx-1226120005661>. See further, Renai LeMay, ‘Secret BitTorrent agreement on the cards’, *Delimiter.com.au*, 29 September 2011, <http://delimiter.com.au/2011/09/29/secret-bittorrent-agreement-on-the-cards/>.

44 The Hon. Robert McClelland was the Attorney-General for Australia from December 2007 to December 2011: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fallmps%2FJK6%22>.

45 Roger Wilkins, Attorney-General’s Department secretary, quoted in Andrew Colley, ‘A-G in call for talks on online piracy’, *The Australian*, 24 August 2011, <http://www.theaustralian.com.au/australian-it/a-g-in-call-for-talks-on-online-piracy/story-e6frgakx-1226120005661>.

In late November 2011, a coalition of Australian ISPs presented a proposal to the content industries for a voluntary 'notice and discovery scheme' for dealing with online copyright infringement.⁴⁶ The coalition of ISPs presenting this scheme proposed that costs for its operation be borne by rightsholders.⁴⁷ The various industry bodies were never able to agree on costs; the content industries rejected this particular proposal but expressed a willingness to work with ISPs to formulate an alternative scheme.⁴⁸ Discussions ultimately stalled, however, in the wake of the *iiNet* decision. General academic and industry consensus was that, post-*iiNet*, ISPs were in such a strong legal position that they had no incentive to agree to industry codes requiring them to pass on warning notices or implement any other measures to prevent copyright infringement.⁴⁹

This stalemate between ISPs and the content industries led to significant apparent frustration on the part of the new Labor Government. In late 2013, the Attorney-General's Department sought to recommence discussions with Australian telecommunication providers and content creators about industry protocols for tackling copyright infringement,⁵⁰ but again nothing came out of these discussions. The Government's frustration came to a head in July 2014, when the Attorney-General's Department released a discussion paper entitled, 'Online Copyright Infringement'.⁵¹ The discussion paper evidenced a vexation that ISPs were not doing more to combat online infringement. In it, the Government proposed sweeping amendments to Australia's authorisation liability doctrine that would have overturned the *iiNet* decision by de-linking the element of control from secondary liability.⁵² The paper was framed in the over-arching rhetoric that "everybody has a role" in reducing online copyright infringement.⁵³ On this basis, the Government essentially proposed to predicate liability primarily on an intermediary's failure to take 'reasonable steps' to prevent or avoid infringement even without a direct power to prevent particular infringing acts.⁵⁴

46 Communications Alliance Ltd, 'Australian Internet Service Provider (ISP) Proposal: A Scheme to Address Online Copyright Infringement', available at http://www.commsalliance.com.au/__data/assets/pdf_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf.

47 Ibid.

48 Josh Taylor, 'Content owners reject ISP piracy scheme', *ZDNet*, 29 November 2011, <http://www.zdnet.com.au/content-owners-reject-isp-piracy-scheme-339326967.htm> and Supratim Adhikari, 'Content owners reject ISPs' anti-piracy scheme: report', *Technology Spectator*, 29 November 2011, <http://technologyspectator.com.au/industry/media/content-owners-reject-isps-anti-piracy-scheme-report>.

49 See, for example, David Lindsay, 'ISP Liability for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v iiNet*' (2012) 62(4) *Telecommunication Journal of Australia* 53.1, 53.18.

50 Mitchell Bingemann, 'Brandis calls time on online piracy', *The Australian*, 28 October 2013, <http://www.theaustralian.com.au/media/digital/brandis-calls-time-on-online-piracy/story-fna03wxu-1226747867711#>; see also Campbell Simpson, 'Australian attorney-general won't confirm copyright meetings with ISPs', *CNet Australia*, 30 October 2013, <http://www.cnet.com.au/australian-attorney-general-wont-confirm-copyright-meetings-with-isps-339345833.htm>.

51 Australian Government, 'Online Copyright Infringement Discussion Paper' (July 2014) <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF>.

52 Kylie Pappalardo, Submission to the Online Copyright Infringement Discussion Paper (July 2014) <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/OnlineCopyrightInfringement-KyliePappalardo.pdf>

53 Australian Government, 'Online Copyright Infringement Discussion Paper' (July 2014) <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF>, p 2.

54 Kylie Pappalardo, Submission to the Online Copyright Infringement Discussion Paper (July 2014) <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/OnlineCopyrightInfringement->

After significant vocal opposition from user groups, copyright academics, and other commentators, the Australian Government withdrew the proposal. Nevertheless, the paper served an important political function. It presented a harsh reality to the bulk of ISPS who had so far refused to meet rightsholders' demands that they take more steps to actively police the actions of their users. When the Government subsequently called on ISPs to reach agreement with copyright owners on an industry code to tackle copyright infringement, the threat was explicit and clear: if no code was agreed upon, the Government would either mandate its own code for the industry or introduce legislation that would lead to significant risk of liability for ISPs and other technological intermediaries. This threat, as it turned out, was a sufficient incentive to convince ISPs to progress with a self-governing negotiated graduated response code.

1. An industry-led graduated response code

On 10 December 2014, the Federal Attorney-General and the Minister for Communications requested, in a joint letter to industry leaders, that a code be developed through consultation with ISPs, consumer representatives and rightsholders from the music, film, television and performing arts industries. In line with the Federal Government's timeline, the final Code was submitted to the Australian Communications and Media Authority (ACMA) for registration as an industry code under the *Telecommunications Act 1997* (Cth) on 8 April 2015. The Code proposes a Copyright Notice Scheme that will apply only to residential fixed internet account holders.⁵⁵ The Code has not yet been registered by the ACMA because ISPs and rightsholders have not yet been able to reach commercial agreement about who will bear the costs of the scheme. This continues to be a major stumbling block in bringing the Code into effect.⁵⁶ Once the Notice Scheme is registered as an industry code under the Telecommunications Act, approximately 70 of Australia's largest ISPs will be required to comply with it.⁵⁷ Failure to do so will make them liable to civil penalties. The effectiveness of the Code will be independently evaluated 18 months after its commencement.

Under the Notice Scheme, rightsholders will be able to send infringement reports to ISPs that identify IP addresses alleged to have been used to infringe copyright.⁵⁸ ISPs will then be obliged to take reasonable steps to match the IP addresses identified by the rightsholders to account holders to which the IP addresses were assigned at the time of the alleged infringement.⁵⁹ Where an IP address can be matched, the ISP will be required to send the account holder an 'Education Notice' which provides information on the alleged infringement, the identity of the rightsholder and a description of the content it is alleged has been infringed.⁶⁰ The notice would also contain, amongst other things, the assurance that personal information has not been passed on to a third party, an

KyliePappalardo.pdf, p 4.

55 Communications Alliance, 'Copyright Notice Scheme, Industry Code C653:2015' <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf>.

56 The Code was initially scheduled to commence by 1 September 2015.

57 The Code will only apply to ISPs who have 1,000 account holders individually or as part of a corporate group, and an initial cap on volume will be limited to up to 200,000 notices to be processed every 12 months.

58 Communications Alliance, 'Copyright Notice Scheme, Industry Code C653:2015' <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf> [3.4].

59 Ibid [3.6.2].

60 Ibid [3.6.3], [3.7.1]

acknowledgement that the detected alleged infringement does not necessarily correlate to the account holder's activity, and general information about accessing lawful online content.⁶¹ Upon receipt of further infringement notices with respect to an account holder, the ISP will be required to issue a second 'Warning Notice' and a third 'Final Notice'.⁶²

If a Final Notice is received within a 12 month period, the Code provides that the account holder will have the option to challenge the validity of the allegations by having them independently reviewed by a panel.⁶³ The panel will comprise of six representative members: two appointed by rightsholders, two by ISPs and two each from different consumer organisations. Either after the allocated challenge period has expired or if a challenge is unsuccessful, the IP address related to the account will be listed on a "Final Notice List." Rightsholders will be able to write to an ISP requesting the Final Notice List, which will detail the number of account holders issued with notices and any record of acknowledgement from the account holders that they received a Final Notice. The policy provides that rightsholders may then elect to file an application for preliminary discovery in court, seeking access to account holders' details. ISPs will be required to "act reasonably" to facilitate and assist rightsholders' applications to court. The Code leaves it to the courts' discretion as to whether preliminary discovery should be granted.

The proposed Code claims to be designed to deter copyright infringing behaviour and, at the same time, to educate consumers about available and lawful content alternatives. In focussing on education, the Code appears to differ from graduated response schemes implemented in overseas jurisdictions which include measures requiring ISPs to take action against users suspected of infringing copyright by suspending their accounts and eventually terminating service.⁶⁴ Despite its emphasis on education, the proposed Code presents a number of key concerns for consumers. Most importantly, there is potential for abuse of the system once rightsholders obtain preliminary discovery of account holders' personal details. In other jurisdictions, some rightsholders have used discovery for so-called 'speculative invoicing', where rightsholders contact consumers with offers to settle potential infringement actions for grossly disproportionate amounts.⁶⁵ Speculative invoicing is dangerous for two reasons. First, the settlement figures claimed can have little relationship to the harm suffered and, as such, become unfair extra-legal penalties that abuse preliminary discovery available through the legal system.⁶⁶ Second, consumers face a difficult choice between paying up or incurring significant expense in contesting an action in court. Courts in Australia and internationally have begun to exercise greater judicial oversight over the ways that rightsholders communicate with users in order to limit these practices.⁶⁷ As one example, we consider

61 Ibid [3.7.1].

62 Ibid [3.6.3].

63 Ibid [3.10].

64 For example, the limited scheme in Ireland implemented in response to the *EMI Records & Ors v Eircom Ltd* [2010] IEHC 108 case seems to empower the ISP to terminate subscriber accounts upon receiving three notices of infringement. Additionally, the Copyright Alert Scheme implemented in the United States permits ISPs to impose 'mitigation measures' upon receipt of the fifth and sixth notice of infringement – these measures may include temporary restriction of the users' internet access. See Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law and the Arts* 147, 173 (on the Irish scheme) and 177 (on the US scheme).

65 See, e.g., *Patrick Collins. Inc. v John Doe 1*, 2012 US Dist LEXIS 71122 (ED NY, 2013), 5.

66 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2010] EWHC 723 (Ch), [137].

67 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2010] EWHC 723 (Ch), [36]; *Voltage Pictures LLC v John Doe* (2014) 240 A.C.W.S (3d) 964. [133].

the Australian Federal Court's efforts to limit speculative invoicing in *Dallas BuyersClub LLC v iiNet Ltd* [2015] FCA 317 below. This case suggests that Australian courts may be willing and able to provide the supervision to avoid abuse of the Code.

2. Preliminary discovery

The scheduled implementation of the graduated response code by September 2015 did not come soon enough for some rightsholders. Dallas Buyers Club LLC, the US entity which owns the copyright in the film, and its parent company Voltage Pictures LLC, were the applicants in the proceedings seeking preliminary discovery from iiNet and five other Australian ISPs of the identities of the account holders associated with ISP addresses which the applicants claimed had shared the film over BitTorrent. The applicants believed that although the relevant account holders may not necessarily be the same as the persons infringing their copyright, their information would help in leading to the identification of the actual infringers.

The ISPs resisted the application on many bases. The ISPs' key argument was that owing to the nature of peer-to-peer file sharing sites like BitTorrent, the identified IP addresses only downloaded a very small "sliver" of the film, which is insufficient to show 'substantial' copying as required for a finding of copyright infringement.⁶⁸ The ISPs put forward a number of reasons to support the argument that the Court's discretion to order preliminary discovery should not be exercised. These included that the demonstrated infringements were trivial in nature and it made no commercial sense for the applicants to commence the proceedings in seeking such small sums, that there was evidence suggesting that the applicants would engage in the practice of speculative invoicing if they were given the information of the account holders they sought, and that the preliminary discovery process was being used as a tool of investigation rather than identification.⁶⁹

On 7 April 2015, Justice Perram of the Federal Court delivered judgment in *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, ordering preliminary discovery from six Australian ISPs of the information of 4,726 account holders of IP addresses believed to have infringed copyright in the 2012 Jean-Marc Vallée film *Dallas Buyers Club*. While major rightsholders have indicated that they have no plans to sue Australian subscribers whose information they obtain under the industry Code described above, this decision illustrates how cases may proceed if the Code proves to be unwieldy or ineffective for the purposes of deterring alleged copyright infringement. Importantly, the decision imposes substantial protections for consumers through judicial oversight of the discovery process.

Justice Perram rejected the ISPs' submissions and ordered the ISPs to provide the applicants with the names and physical addresses of the account holders associated with each of the 4,726 IP addresses.⁷⁰ While it was accepted that the identified IP addresses only downloaded a small sliver of the film, His Honour was satisfied that this provided strong circumstantial evidence that the end-user was infringing the copyright in the film overall and held that it was sufficient evidence for a preliminary discovery application.⁷¹ At this stage of proceedings, it was not necessary for the applicants to establish a *prima facie* case of infringement, just that they had a real case

68 *Dallas BuyersClub LLC v iiNet Ltd* [2015] FCA 317, [28].

69 *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, [73].

70 *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, [5].

71 *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, [30].

which was not fanciful.⁷²

In making the order, Justice Perram imposed conditions on the applicants. Firstly, the information of the account holders can only be used for the purposes of recovering compensation for the infringements and is not otherwise to be disclosed without the leave of the Federal Court. Secondly, a draft of any letter the applicants intend to send to account holders associated with the identified IP addresses must be submitted to his Honour.⁷³ The second condition stems from the observation that any representations made to consumers about liabilities which they do not have or which are drastically inflated may constitute misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law in the *Competition and Consumer Act 2010* (Cth).⁷⁴

In Justice Perram's final orders, ISPs were required to pay 75% of the applicants' costs of the proceedings.⁷⁵ His Honour had initially ordered the applicants to pay all of the ISPs' costs, but changed his order in response to the adversarial position adopted by the ISPs which "put nearly everything in issue" and extended the length of the court hearing.⁷⁶ Justice Perram's willingness to alter his costs order drastically reduces the incentive for future ISPs to diligently challenge discovery orders.⁷⁷

Justice Perram's decision to require court oversight of the way in which subscriber details are used is an extremely important protection against abuse of the legal process for preliminary discovery orders. Through this mechanism, the court has effectively reduced, if not eliminated, the risk of account holders being subject to speculative invoicing. Similar restrictions by courts have been important safeguards in both the UK⁷⁸ and Canada⁷⁹ to prevent extortionate demands that rightsholders, including Voltage, have made in other jurisdictions.⁸⁰ This has proved important in Australia – in a subsequent hearing, Justice Perram rejected Voltage Pictures' draft demands as unreasonable and excessive.⁸¹ Voltage Pictures were initially elusive as to the settlement figure it would include in letters sent to users,⁸² but eventually informed the Federal Court that it would include the purchase price of a single legitimate copy of the film, another fee for sharing the film to other BitTorrent users, a punishment for any other infringement of the copyright in other, unrelated, content that subscribers admit to have illicitly downloaded and an amount that would cover the cost of tracking down users associated with infringing downloads.⁸³ While Justice Perram found that Voltage could ask for the costs of a single copy of the film and an appropriately proportioned fee to recover its legal costs so far. However, his

72 See *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* (2009) 259 ALR 254 at [54].

73 *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, [5].

74 *Dallas Buyers Club LLC v iiNet Ltd* [2015] FCA 317, [82].

75 *Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422, [7].

76 *Dallas Buyers Club LLC v iiNet Limited (No 3)* [2015] FCA 422, [6].

77 See further Nicolas P Suzor, 'Privacy v IP Litigation: Preliminary Third Party Discovery on the Internet' (2004) 25 *Australian Bar Review* 227.

78 *Golden Eye (International) Ltd v Telefonica UK Ltd* [2010] EWHC 723 (Ch), [36].

79 *Voltage Pictures LLC v John Doe* (2014) 240 A.C.W.S (3d) 964. [133].

80 See e.g. Ernesto, *Hurt Locker Makers Target Record Breaking 24,583 BitTorrent Users* (23 May 2011) TorrentFreak <<https://torrentfreak.com/hurt-locker-makers-target-record-breaking-24583-bittorrent-users-110523/>>.

81 *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838.

82 *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838, [9]-[12].

83 *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838, [15].

Honour rejected attempts to multiply these fees, potentially thousands of times, for other BitTorrent peers to whom the subscriber may have transmitted parts of the film. His Honour also rejected the claim for monetary penalties based on infringements of other copyright owners' rights to which account holders may have admitted. His Honour described Voltage's proposition that BitTorrent users might have avoided infringement by approaching Voltage to negotiate a distribution arrangement in return for a licence fee as "so surreal as not to be taken seriously".⁸⁴

Ultimately, Justice Perram's refusal to allow Voltage to send its letters as drafted provides protection for consumers from speculative invoicing practices.⁸⁵ This level of judicial oversight, if it is repeated in future cases, provides some assurance that the damages rightholders may seek from account holders must be far more reasonable than might otherwise be claimed in such demand letters. While this safeguard has not explicitly been introduced into the proposed Copyright Notice Scheme, preliminary discovery in the judicial system is the only mechanism for ISPs to disclose identifying details of subscribers. In this decision, the Australian Federal Court here has clearly set out a series of protections for consumers that will require rightholders to make a binding commitment not to use discovery to seek damages that they would not reasonably be able to recover in litigation.

3. Website blocking

Given the two developments described above, it might appear that copyright owners have largely succeeded in their strategic aim to compel ISPs to pass infringement warnings on to ISP customers and to hand back to copyright owners at least some ISP customer details,⁸⁶ in an effort to convince users that the threat of copyright enforcement is real. It is perhaps unlikely that the majority of large rightholders will pursue infringement actions against users, particularly given the disastrous public-relations results of the RIAA's campaign to sue tens of thousands of US consumers nearly ten years ago. At least for the giant media conglomerates, if not for the independent studios, Australia's graduated response scheme appears designed primarily as a means either to scare consumers or to deliver targeted marketing messages aimed at encouraging consumers to gain access to copyright goods through legitimate channels. On the other hand, the limitations imposed by the Federal Court on the way that preliminary discovery can be used severely restricts the ability of the less scrupulous of the smaller rightholders from using these schemes as a revenue-raising strategy.

Rightholders, as another alternative, have turned their attention to enlisting the aid of ISPs in order to block subscribers' access to foreign websites that facilitate infringement. Frustrated with the continual "arms race" and jurisdictional challenges of locating and closing websites like The Pirate Bay, rightholders have sought to extend a website blocking scheme originally developed in the UK to other jurisdictions, including Australia. In 2011, the

84 *Dallas Buyers Club LLC v iiNet Limited (No 4)* [2015] FCA 838, [23].

85 As of 4 September 2015, Dallas Buyers Club LLC decided not to appeal Justice Perram's ruling against its methodology for calculating damages. Indications are that they are re-working how to pursue additional damages beyond what the court has said it would allow: Claire Reilly, *Dallas Buyers Club turns down appeal, holds firm on damages* (4 September 2015) CNET <<http://www.cnet.com/au/news/dallas-buyers-club-turns-down-appeal-holds-firm-on-damages/>>.

86 Though ISPs are not compelled to hand over the identities of the customers; this is information which remains within the purview of the courts on a case by case basis.

England and Wales High Court granted injunctive relief against an ISP, British Telecom (BT), requiring it to block the Newzbin2 BitTorrent indexer⁸⁷ and ordering relief for the first time under s 97A of the *Copyright, Designs and Patents Act 1988* (UK), which had been introduced in 2003.⁸⁸ This followed an earlier successful action against Newzbin's first incarnation, where the UK company responsible for operating the site was ordered to shut it down.⁸⁹ Shortly afterward, the site was reincarnated as Newzbin2 – a direct copy of the original, hosted outside of jurisdictional reach in the Seychelles. Rightsholders, faced with a valid successful judgment with a largely ineffective remedy, sought to require one of the UK's ISPs to block access to the new site.

The BT decision proved to be an attractive model for rightsholders. While on a technical level the blocks are trivially easy to circumvent, many more orders for UK ISPs to block websites have since been issued. The scheme has expanded as well. In the UK, the *Cartier* decision extended the obligation to block to include sites that were enabling the infringement of trade marks by others who traded in counterfeit goods.⁹⁰ This decision, surprisingly, found that such an obligation arose under Article 11 of the EU's Enforcement Directive,⁹¹ despite the fact that s 97A, on which earlier orders were based, applies only to copyright infringement.⁹² Similar orders were also made in copyright law by other European Courts – although the European Court of Justice eventually found that Dutch orders to block file sharing websites were ineffective and therefore imposed disproportionate restrictions on freedom of communication.⁹³

Rightsholders have sought to extend their victories in Europe to Australia and other jurisdictions. On 26 June 2015, the Australian Federal Government amended the *Copyright Act 1968* (Cth) to allow rightsholders to apply to the Federal Court for an injunction requiring ISPs to disable access to websites hosted in foreign jurisdictions.⁹⁴ Rightsholders must show that the online location either directly infringes copyright or facilitates infringement.⁹⁵ Rightsholders bear the onus of showing that the online location has a primary purpose of infringing or facilitating the copyright infringement.⁹⁶ The Court may take into consideration a range of factors including whether disabling access to the online location is a proportionate response in the circumstances, the impact on any person likely to be affected by the grant of the injunction, and whether it is in the public interest to disable access to the online location.⁹⁷ The legislation provides that, if granted, the injunction must require the

87 *Twentieth Century Fox Film Corporation v British Telecommunications Plc* [2011] EWHC 2714 (Ch) (26 October 2011).

88 The Copyright and Related Rights Regulations 2003 (S.I. 2003/2498) (UK), reg. 27(1).

89 *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch) (29 March 2010).

90 *Cartier, Montblanc and Richemont v BSKyB, BT, TalkTalk, EE and Virgin (Open Rights Group intervening)* [2014] EWHC 3354 (Ch) (17 October 2014).

91 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

92 See Michael Williams and Rebecca Smith, 'Searching for the silver bullet: How website blocking injunctions are changing online IP enforcement' (2014) 25 *AIPJ* 59.

93 *REIN v ZIGGO* (2012), translation provided by: <http://pirateparty.org.au/media/documents/ECLI_NL_GHDHA_2014_88_ENG_Ziggo_v_BREIN.pdf>

94 *Copyright Act 1968* (Cth) s 115A, introduced by *Copyright Amendment (Online Infringement) Act 2015* (Cth).

95 *Copyright Act 1968* (Cth) s 115A(1).

96 Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), 38.

97 *Copyright Act 1968* (Cth) s 115A(5). See also, Revised Explanatory Memorandum, Copyright

ISP to take reasonable steps to disable access to the online location.⁹⁸ The estimated cost to ISPs of complying with injunctions is expected to total approximately \$130,000 on an annual basis.⁹⁹

According to the Explanatory Memorandum, the 'primary purpose' test is an intentionally high threshold for the rightsholder to meet, as a safeguard against potential abuse.¹⁰⁰ In exercising its discretion, the court may take into account the flagrancy of the infringement or its facilitation.¹⁰¹ The legislation as enacted, however, raises serious concerns about how it will be interpreted by the courts. In particular, it is unclear when an online location will 'facilitate' an infringement. The word 'facilitate' has not been defined in the Copyright Act and is unfamiliar to Australian copyright law.¹⁰² It appears to be broader than the term 'authorise', which conditions liability for secondary copyright infringement. Despite the Government's assurances, it appears likely that the filtering scheme may be used to block foreign sites that would not actually be liable for copyright infringement if they were hosted within Australia.

This Australian legislation passed both houses of Parliament with little debate or opposition. One of the few voices of dissent was Greens Senator Scott Ludlam, whose address to the Senate expressed concern about the dangerous potential for "expansion and scope creep".¹⁰³ Senator Ludlam pointed out that the Australian Government's record is not great when it comes to carefully tailoring legislation designed to regulate the internet; Senator Ludlam cited the secret blacklists compiled by ACMA in 2009, which notoriously listed clearly innocuous sites that were erroneously proposed to be blocked alongside sites that contained child abuse material. Several years later, the Australian Securities and Investment Commission inadvertently blocked over 250,000 innocent sites in addition to the one site it was targeting,¹⁰⁴ eventually leading to a Parliamentary review into the administrative enforcement powers available under the *Telecommunications Act 1997* to require ISPs to block websites.¹⁰⁵

The legitimacy of decentralised enforcement

The Australian changes explored here mark an important shift in the way that obligations are imposed on online

Amendment (Online Infringement) Bill 2015 (Cth), 5.

98 *Copyright Act 1968* (Cth) s 115A(2).

99 Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), 11.

100 Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), 38.

101 Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth), 5.

102 See, for example, Australian Digital Alliance, 'Copyright Amendment (Online Infringement) Bill 2015' Submission 16 to Senate Standing Committee on Legal and Constitutional Affairs

<<http://www.aph.gov.au/DocumentStore.ashx?id=f86f1c37-04aa-46bd-989f-148afb561037&subId=350426>> 7;

Assoc. Prof. Kimberlee Weatherall, 'Copyright Amendment (Online Infringement) Bill 2015' Submission 23 to Senate Standing Committee on Legal and Constitutional Affairs

<<http://www.aph.gov.au/DocumentStore.ashx?id=ed054552-0a85-4d04-8725-5996e19a71e6&subId=350272>> 3.

103 Commonwealth, *Parliamentary Debates*, Senate, 22 June 2008, 4021-4026 (Scott Ludlam), 4024.

104 Bernard Keane, *ASIC Accidentally Blocked 250,000 Sites in Scam Campaign* (4 June 2013) Crikey <<http://blogs.crikey.com.au/thestump/2013/06/04/asic-accidentally-blocked-250000-sites-in-scam-campaign/>>.

105 House of Representatives Committee on Infrastructure and Communications, *Balancing Freedom and Protection: Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services* (1 June 2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services/Report>.

intermediaries. The dominant legal means of enlisting the assistance of online intermediaries in copyright enforcement had, until recently, taken the form of the threat of secondary liability. These new methods do not depend on the threat of liability to make intermediaries compliant – they give copyright owners more direct power to require intermediaries to aid them in their enforcement pursuits. This reflects a more blunt approach to copyright enforcement: in some cases, ISPs are required to act without any effective judicial scrutiny of the methods employed, which exposes ISPs to a great deal of uncertainty about, and risk concerning, when the actions of their subscribers must trigger a response. The law sets standards for compliance by the ISPs, and any failure in meeting those standards leaves the ISP open to very expensive potential claims from copyright owners. The predictable result is that the intermediary ISP will enforce the law in a way that errs on the side of over-enforcement, impinging on the legitimate rights of subscribers to free expression¹⁰⁶ and due process.¹⁰⁷

Debates about the appropriate extent of ISP liability continue to fester in many jurisdictions and in multilateral fora, without much hope of resolution. There are at least four groups of serious competing tensions that are not easily reconcilable: the importance of developing effective mechanisms to enforce the law, the liberty interests of individuals, the liberty interests of intermediaries, and the substantive intellectual property rights of rightsholders. Most of the recorded debate has been rooted only in the conflict between the ISPs and rightsholders, and has not adequately considered the interests of internet users.¹⁰⁸ A large number of debates about intermediary liability continue to falter on the core difficulty of developing governance procedures that are responsive to the needs of stakeholders without sacrificing the 'generativity'¹⁰⁹ of the system – the openness of infrastructure that has made the internet such a powerful tool for innovation and liberty.¹¹⁰ In large part, this is an anxiety about the sophistication of law and the ability of lawmakers to regulate technology – a fear that bad law will hinder innovation and liberty.¹¹¹

Two of the three recent changes in Australian law described here show a growing sophistication in the way that states regulate intermediaries through discrete obligations, not by directly imposing liability on intermediaries based on the conduct of their users. While these obligations are still generally resisted by telecommunications industries, in the end we are seeing compromises reflected in government sanctioned solutions between copyright holders and intermediary ISPs, such as legislative bargains or essentially self-governing negotiated industry codes, which are able to provide workable methods of enforcing law without introducing risks or costs too high

106 United Nations, *Universal Declaration of Human Rights*, Article 19

<<http://www.un.org/en/documents/udhr/>>; IPRC, 'Charter of Human Rights and Principles for the Internet' (Internet Rights and Principles Coalition, 2014) <<http://internetrightsandprinciples.org/wpcharter/>>.

107 Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2011) 25 *Berkeley Technology Law Journal* 1819; Nicolas Suzor, 'Order Supported By Law: The Enforcement of Norms in Virtual Communities' (2012) 63 *Mercer Law Review* 523; Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34 *University of New South Wales Law Journal* 1.

108 See Julie E. Cohen, 'Configuring the Networked Citizen' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds.), *Imagining New Legalities: Privacy and Its Possibilities in the 21st Century* (Stanford University Press, 2012) 129.

109 Jonathan Zittrain, *The Future of the Internet and How to Stop It* (Yale University Press, 2008).

110 Brett M Frischmann, *Infrastructure: The Social Value of Shared Resources* (Oxford University Press, 2012); Tim Wu, *The Master Switch The Rise and Fall of Information Empires* (Atlantic Books Ltd, 2010).

111 David R Johnson and David Post, 'Law and Borders--The Rise of Law in Cyberspace' (1995) 48 *Stanford Law Review* 1367.

for intermediaries. In these compromises, however, it appears to be the interests of end users that are largely left out. In the context of this shift, there is, for instance, an important gap in knowledge about how intermediaries make decisions to take down or refuse to take down content,¹¹² how those decisions may be influenced by both state and non-state actors,¹¹³ and how the rights of individuals to due process are actually protected in these processes.¹¹⁴

In the context of increasing pressures on intermediaries from rightsholders and, in turn, governments, there is a growing global unease about how the rights of individuals can be protected online.¹¹⁵ The task of identifying and developing social, technical, and legal approaches that can improve the legitimacy of online governance is an increasingly pressing issue.¹¹⁶ This is also a recognised gap in the regulatory theory literature, where scholars have identified a clear need to further explore how constitutional values and rights can be protected when governance is decentralised.¹¹⁷ There is an increasingly pressing need to interrogate what good, legitimate governance should require of private online intermediaries. We suggest that a key frame for analysis should be based on the constitutional principles of the rule of law – particularly certainty, due process, consent, and respect for fundamental rights.¹¹⁸ This analysis foregrounds two main sets of questions:

1. How can intermediaries respond to the demands of disparate groups of public authorities and non-state actors? This raises important questions about not only how to deal with conflicting obligations (a classic jurisdictional problem), but whether and how intermediaries should resist these demands and protect the freedom of their users to communicate and seek information.¹¹⁹
2. How can different actors influence the way that intermediaries design and govern their networks to improve legitimacy? Intermediaries are under mounting pressures to increase the transparency of the decisions they make and the requests they receive from states and private actors,¹²⁰ but how well

112 Frank Pasquale, *The Black Box Society* (Harvard University Press, 2015).

113 Ian Brown and Christopher T Marsden (eds), *Regulating Code Good Governance and Better Regulation in the Information Age* (MIT Press, 2013).

114 Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2011) 25 *Berkeley Technology Law Journal* 1819.

115 For example, IPRC, 'Charter of Human Rights and Principles for the Internet' (Internet Rights and Principles Coalition, 2014) <<http://internetrightsandprinciples.org/wpcharter/>>.

116 Ian Brown and Christopher T Marsden (eds), *Regulating Code Good Governance and Better Regulation in the Information Age* (MIT Press, 2013); Laura DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014); Robin Mansell, *Imagining the Internet Communication, Innovation, and Governance* (OUP Oxford, 2012).

117 Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137; Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7 *Regulation & Governance* 114; Bronwen Morgan, 'New Directions in Sociolegal Scholarship' in Bronwen Morgan (ed), *The intersection of rights and regulation new directions in sociolegal scholarship* (Ashgate, 2007) 1.

118 Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2011) 25 *Berkeley Technology Law Journal* 1819; Nicolas Suzor, 'Order Supported By Law: The Enforcement of Norms in Virtual Communities' (2012) 63 *Mercer Law Review* 523; Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34 *University of New South Wales Law Journal* 1.

119 See Dan Svantesson, 'Between a Rock and a Hard Place: An International Law Perspective of the Difficult Position of Globally Active Intermediaries' (2014) 30 *Computer Law & Security Review* 348.

120 Archon Fung, Mary Graham and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007); Christopher A Parsons, 'Do Transparency Reports Matter for Public Policy?

increased transparency is working remains unclear. More work needs to be done to closely examine the ways that intermediaries interact with, adopt, and resist social, market, and legal pressures to develop more legitimate policies and terms of service.¹²¹

The analysis that is needed now, in light of the recent Australian legal developments outlined above, must specifically examine the intersection between these regulatory provisions and public constitutional values.¹²² The language of constitutionalism and rights has been almost exclusively applied to the actions of the state. It does not apply directly to the technical and policy decisions of private online platforms.¹²³ But this is precisely what is needed as both state and non-state actors continue to place pressure on intermediaries to take more responsibility for enforcing law and social norms.

The creator of the World Wide Web, Sir Tim Berners Lee, recently called for a 'Magna Carta for the Web'¹²⁴ to protect the rights of individuals. In New Zealand, these principles have made it as far as a draft Bill of Internet Rights and Freedoms.¹²⁵ We suggest that a great deal more work is needed to adapt the values of constitutionalism as a measure of the ability of decentralised regulatory arrangements to protect the substantive and procedural rights of individuals. The measure of legitimacy that is needed here is both 'reflexive' and 'responsive':¹²⁶ it requires a degree of autonomy to allow particular groups to develop governance norms that are adapted to their needs,¹²⁷ as well as constraints on autonomy in response to public values.¹²⁸ This analysis, we believe, must explore how private intermediaries might be influenced to make decisions in ways that uphold the function of protecting rights and due process without the expense or rigidity of formal legal processes.¹²⁹

Evaluating the Effectiveness of Telecommunications Transparency Reports' (SSRN Scholarly Paper ID 2546032, Social Science Research Network, 13 January 2015) <<http://papers.ssrn.com/abstract=2546032>>.

121 Melissa De Zwart, 'Contractual Communities: Effective Governance of Virtual Worlds' (2010) 33 *University of New South Wales Law Journal* 605.

122 Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2011) 25 *Berkeley Technology Law Journal* 1819.

123 Lawrence Lessig, *Code* (Basic Books, Version 2.0, 2006).

124 Jemima Kiss, 'An Online Magna Carta: Berners-Lee Calls for Bill of Rights for Web' *The Guardian*, 12 March 2014 <<http://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web>>.

125 Gareth MP Hughes, *Internet Rights and Freedoms Bill* (2014) <<http://www.internetrightsbill.org.nz/>>.

126 Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24.

127 David R Johnson and David Post, 'Law and Borders--The Rise of Law in Cyberspace' (1995) 48 *Stanford Law Review* 1367; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.

128 Brian F Fitzgerald, 'Software as Discourse: The Power of Intellectual Property in Digital Architecture' (2000) 18 *Cardozo Arts & Entertainment Law Journal* 337; Christine Parker, 'The Pluralization of Regulation' (2008) 9 *Theoretical Inquiries in Law* 349.

129 Bronwen Morgan, 'The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality' (2003) 12 *Social & Legal Studies* 489; Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen J McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The new corporate accountability: corporate social responsibility and the law* (Cambridge University Press, 2007) 207.